No. 80-148
IN THE

Supreme Court of the United States

October Term, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Interest of Amicus Curiae and Consent

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from unreasonable searches of their personal effects. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the petitioner.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Verbal consent to the filing of the brief has been given by Marshall W. Krause, Esq., and by the Office of the Attorney General of the State

of California, counsel for petitioner and respondent, respectively. Letters reflecting such consent will be filed with the Clerk of this Court shortly.

ARGUMENT

The Outward Appearance of a Container Can Provide No More Than Probable Cause; It Cannot Excuse the Failure to Obtain a Warrant.

The warrant requirement is the cornerstone of the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States.[1] *United States v. United States District Court*, 407 U.S. 297, 316 (1972). "[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, when an exception to the warrant requirement is alleged to apply, "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

Can that burden be discharged merely be showing that there was strong probable cause to believe that material subject to seizure was located in the place which was searched? Numerous decisions of this Court have held that it cannot. *See, e.g., Arkansas v. Sanders*, 442 U.S. 753, 758 (1979); *Katz v. United States, supra*, 389 U.S. at 357; *Johnson v. United States*, 333 U.S. 10, 14 (1948). "Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a

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[1] "The warrant clause includes three distinct protections: the requirement of probable cause ensures justification; the requirement of particular description guarantees limitation; and the requirement of prior determination compels neutral evaluation. Thus, compliance with the warrant requirement ensures the sanctioning of only justifiable limitations, reasonable in scope." Note, United States v. Chadwick *and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. Rev. 436, 459 (1978) [hereinafter cited as The Lesser Intrusion Concept] (footnotes omitted).

search." *Chambers v. Maroney*, 339 U.S. 42, 51 (1970). These cases established a simple, workable rule: In the absence of exigent circumstances, both probable cause *and* a warrant are required.

Unfortunately, this previously sharp distinction between facts showing probable cause and facts showing an exception to the warrant requirement was blurred by dicta in *Arkansas v. Sanders, supra*, 442 U.S. at 764 n. 13 [hereinafter referred to as footnote 13].[2] *Sanders* held that the "automobile exception" may not be used to justify the warrantless search of containers lawfully seized from a moving vehicle. 442 U.S. at 765. With that holding we heartily agree. It is the hypothetical suggestion in footnote 13 that warrantless searches are permitted of containers, the contents of which can be inferred from their exterior, which departs from prior law and engenders needless confusion for the police, the public, and the courts.

This Court has consistantly held that the inference-drawing process is the function of the magistrate, not of "the officer engaged in the often competitive process of ferreting out crime." *Johnson v. United States, supra*, 333

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[2]Footnote 13 provides as follows:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See *Harris v. United States*, 390 U.S. 234, 236, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

U.S. at 14; *accord, Mincey v. Arizona*, 437 U.S. 385, 395 (1978). Thus, a warrant was required for the search of the footlocker in *United States v. Chadwick*, 433 U.S. 1 (1977) despite both the fact that abundant probable cause supported the search and the fact that a portion of the footlocker's contents (the talcum powder leaking from inside) was actually in plain view. 433 U.S. at 15-16. This holding is clearly inconsistent with the dicta in footnote 13.[3]

It would be unreasonable for this Court to overrule its prior decisions and elevate footnote 13 into a new rule of law. A rule equating a container's suggestive outward appearance with a plain view of the contents thereof[4] is a rule incapable of uniform application. Neither policemen nor judges can be expected to agree on the extent to which a container's contents are inferrable from its outward appearance.[5] What is obvious to one person will simply not

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[3]Footnote 13 is also in conflict with the views expressed by Justice Stephens in his plurality opinion in *Walter v. United States*, 447 U.S. .... , 65 L.Ed.2d 410 (1980), which involved the search of boxes, "on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents." 65 L.Ed.2d at 414. In concluding that the boxes' outward appearance did not justify a warrantless inspection of the contents, he explained that "[t]he fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed." *Id.* at 418 n. 10.

[4]"It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents." *People v. Marshall*, 69 Cal.2d 51, 59, 442 P.2d 665, 669, 69 Cal.Rptr. 585, 589 (1968) (Traynor, C.J.), *overruled on other grounds in* footnote 18 of *Guidi v. Superior Court*, 10 Cal.3d 1, 17, 513 P.2d 908, 920, 109 Cal.Rptr. 684, 695 (1973).

[5]For an example of such disagreement, one need look no further than the California Court of Appeal opinion in the instant case. The majority and dissent expressed radically different views on the extent to which the contents of the green plastic-wrapped blocks were revealed by the method of packaging.

be obvious to another,[6] and the observer's prior training and experience may distort his judgment on that issue.[7] A literal application of footnote 13 would give the police virtually unlimited discretion to conduct warrantless searches while providing no guidance to the reviewing courts charged with the responsibility of evaluating the reasonableness of that activity.[8]

The resulting confusion is illustrated by *Scisney v. State*, 270 Ark. .... , 605 S.W.2d 451 (1980). That case involved the warrantless search of two very old suitcases secured by masking tape. The prosecution relied on footnote 13 to justify the search, citing the officer's testimony that, in the various drug schools he had attended, he had seen that type of suitcase and "normally [knew] what is used in them, although other things can be, too." 605 S.W.2d at 453. The Arkansas Supreme Court correctly declined to extend the dicta in footnote 13 to the facts of the case before it and held that the search of the suitcase was illegal. *Ibid.* However, what is disturbing about *Scisney* is not its result but the fact that the issue was litigated at all.

It should have been clear from the holding of *Arkansas v. Sanders, supra,* that suitcases at least were presumptively

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[6]The phenomenon of "reality" changing as it is filtered through the perceptions of different individuals is perhaps best illustrated by the classic Kurosawa film "Rashomon."

[7]Experiments suggest that policemen are especially prone to interpret ambiguous facts as being indicative of criminal activity. A.D. Yarmey, *The Psychology of Eyewitness Testimony* 159-160 (1979); *see also* S. Coren, C. Porac, & L.M. Ward, *Sensation and Perception* 418-19 (1979).

[8]In this respect, the policy which supports clarity in the substantive rules governing search and seizure is similar to the policy which requires certainty in criminal statutes. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

protected. *See, e.g., United States v. MacKay*, 606 F.2d 264, 265-66 (9th Cir. 1979). Yet the *Sanders* dicta gave the prosecution in *Scisney* a foot in the door, a basis for arguing that even luggage could be placed outside the warrant requirement if the facts relating to probable cause were sufficiently strong. Unless this "inferrability" concept is rejected by the Court, policemen and prosecutors will continue to use it to attack the warrant requirement that *Sanders* itself reaffirmed.[9]

By holding out the hope that no warrant will be found to have been necessary when a container's outward appearance provides a clue to what is contained therein, footnote 13 undermines the purpose of the exclusionary rule. That rule was designed to deter unlawful police activity, *United States v. Janis*, 428 U.S. 433, 446 (1976); and "[t]o effectively deter police misconduct, the Court must develop inflexible categories and clear rules," Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 365 (1973). As this Court recently stated in a related context: "A single, familiar standard is essential to guide police officers, who have only limited time to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979); *see also* LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup.Ct. Rev. 127, 142.

When this Court has concluded that the disadvantages of case-by-case adjudication outweigh the benefits, it has not

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[9]As Justice Jackson cautioned in his dissenting opinion in *Brinegar v. United States*, 338 U.S. 160, 182 (1949): "We must remember that the extent of every privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."

hesitated to adopt a per se rule. *Rakas v. Illinois*, 439 U.S. 128, 147 (1978), citing *United States v. Robinson*, 414 U.S. 218, 235 (1973). Adoption of a per se warrant requirement for container searches is needed to insure that police officers do not base their decisions as to the necessity of obtaining a warrant on unguided speculation as to the citizen's expectations of privacy and the extent to which those expectations should be respected. If the contents of a container are not in plain view and there has been no consent to search, a warrant should be obtained. *Cf. United States v. Rivera*, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980) (holding that a warrant was required to search sealed black polyethylene garbage bags containing bricks of marijuana); *see generally, The Lesser Intrusion Concept, supra* note 1, at 439, 458-61.[10]

A per se warrant requirement will give effect to the subjective expectation of privacy objectively manifested by the storage of property in an opaque container.[11] It will also promote the goals of the exclusionary rule by providing a clear standard to guide police conduct. Reasonable searches will not be prohibited; they will only be delayed until the probable cause determination can be validated by a mag-

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[10]Imposition of a per se warrant requirement would be especially appropriate in the area of container searches because one purpose of the warrant requirement "is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976). A determination of what is "inferrable" from a container's outward appearance will inevitably be influenced by what a search of that container has revealed.

[11]In determining the existence of a subjective expectation of privacy, "the type or form of container should be irrelevant, for it is the act of storing property which assumes importance and not the container in which it is stored." Comment, 11 Rut.-Cam. L.J. 169, 175 (1979).

istrate. Unreasonable searches, on the other hand, will be avoided, as the Fourth Amendment intends they should be.[12]

Any inferences as to the unseen contents of the sealed, opaque packages in the instant case should have been drawn by a magistrate, not by the police. This case illustrates the mischief which may come from following the opposite procedure. By placing opaque, sealed packages which resembled packages prepared for mailing into the trunk of his automobile, petitioner undoubtedly exhibited an expectation of privacy in his personal property. Even after these packages had been seized by the police, reasonable men could differ as to the possible nature of their contents. A clear and simple rule was needed so that the police, under these circumstances, would not have hesitated to obtain a warrant.

Conclusion

This Court should enunciate a simple and pragmatic rule to govern container searches: Whenever the police have seized a container and the contents are not in plain view, then absent exigent circumstances, they should obtain a warrant. This rule will both simplify the job of the police by specifying when they should seek a warrant and protect the Fourth Amendment rights of the people by insuring that their property will not be unnecessarily subjected to warrantless searches. Because the police in this case did not obtain a warrant when no exigency excused

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[12]The Fourth Amendment was "designed to prevent, not simply to redress, unlawful police action." *Chimel v. California*, 395 U.S. 752, 766 n. 12 (1969). Exclusion of illegally seized evidence is, therefore, only a partial remedy for the violation of the suspect's constitutional rights. *Ibid.* Furthermore, when the illegal search fails to uncover incriminating evidence, the exclusionary rule provides no remedy at all. That is one of the reasons why "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v. United States District Court, supra*, 407 U.S. at 318.

them from doing so, the judgment of the California Court of Appeal sustaining that search should be reversed.

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Respectfully submitted,

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